

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
HITV License Subsidiary, Inc.)	
)	
Complainant)	MB Docket No. 17-292
)	CSR-8943-C
v.)	
)	
DIRECTV, LLC)	
)	
Defendant)	
)	

To: Office of the Secretary
Attn: Chief, Media Bureau

REPLY TO ANSWER TO GOOD FAITH NEGOTIATION COMPLAINT

HITV License Subsidiary, Inc. (“HITV”), pursuant to Section 325(b)(3)(C) of the Communications Act of 1934, as amended, and Sections 76.7 and 76.65 of the Commission’s Rules, hereby replies to the Answer of AT&T Services, Inc. (“AT&T”) filed in response to HITV’s Complaint against DIRECTV, LLC in the above-referenced matter.¹ AT&T’s Answer fails to refute HITV’s demonstration that DIRECTV has not negotiated in good faith. While AT&T attempts to deflect blame onto HITV, its assertion that HITV has itself not negotiated in good faith would make a mockery of the entire concept of good faith negotiations.

The actual facts of this dispute do not appear to be contested, although clearly their interpretation is. AT&T in its Answer attempts to argue that HITV has violated the good faith

¹ Initially, HITV notes that AT&T’s Answer is subject to dismissal for violation of the requirements of Sections 1.49(b) and (c) of the Commission’s rules (47 C.F.R. 1.49(b), (c)), which require all documents filed with the Commission that exceed ten pages to include a separate table of contents and summary. At twelve pages, the Answer should have, but did not, include both a table of contents and summary.

negotiation requirements by failing to put forth a counter-offer, and claims that HITV has asked DIRECTV to negotiate against itself. Nothing could be further from the truth. Indeed, as the undisputed evidence in the record demonstrates, HITV has informed DIRECTV of only a single requirement that it has for any negotiation – that it include some type of compensation. In response to DIRECTV’s initial offer of “must-carry-like” carriage, HITV informed DIRECTV that it would not accept that offer, but offered carriage for some form of monetary compensation. Rather than specifying a particular dollar amount, HITV rather asked DIRECTV if it would even consider any terms other than those it initially offered – in other words, whether DIRECTV would negotiate. DIRECTV refused.

Instead, DIRECTV told HITV that it was unwilling to consider any terms other than those presented in its initial offer. In response to HITV’s October 5 e-mail asking “if DIRECTV is willing to consider carriage on terms other than the “must-carry-like” proposal [DIRECTV] previously presented,” DIRECTV “confirm[ed]” in its October 9 e-mail that those were the only terms it would consider.² Again on October 18, HITV informed DIRECTV that it would be open to extension and negotiation if DIRECTV was “open to carriage on conditions other than those [DIRECTV] ha[d] laid out previously.”³ In response, DIRECTV simply informed HITV that it would remove KFVE’s signal from its systems.⁴ In light of DIRECTV’s stated refusal to consider any alternative terms that those it initially offered, it would be the height of absurdity to read the good faith negotiation rules to require HITV to put forth a proposal that it had already

² See Exhibits 12 and 13 to the Complaint.

³ See Exhibit 16 to the Complaint.

⁴ See Exhibit 17 to the Complaint.

been informed would be rejected.⁵ If anything is to constitute a lack of good faith, it must be the refusal to even consider alternatives, *i.e.* to negotiate, as DIRECTV has done here.

Nor did HITV, by asking if DIRECTV were willing to consider alternative terms, ask DIRECTV to negotiate against itself. HITV never asked DIRECTV to propose alternative terms to its initial offer, only to indicate that it was willing to consider alternative terms. DIRECTV repeatedly refused to do so. To have any meaning, the good faith negotiation requirements must require that a party be willing to consider alternative proposals and counter-offers. DIRECTV's explicit refusal to do so was a clear violation of the good faith requirements. Despite DIRECTV's accusations against HITV, it would be absurd to conclude that HITV somehow violated the good faith requirements by failing to submit a specific counter-offer when it had already been told that DIRECTV would not consider that offer.

DIRECTV further responds that it failed to provide a reason for rejecting HITV's proposal because it did not believe there was such a proposal. This assertion is meritless. As explained above, HITV did make a proposal, offering DIRECTV carriage so long as it agreed to some level of monetary compensation. Although that proposal may not have been as specific as DIRECTV would have preferred, HITV was clear that it would agree to carriage for some level of monetary compensation. DIRECTV refused to even consider the proposal of monetary compensation, or indeed to consider any alternative proposal from HITV. It was this refusal that DIRECTV failed to explain.

DIRECTV also now claims that this proceeding is now moot because it has made an alternative proposal to HITV. That claim is unconvincing, as DIRECTV's purported second proposals were not in any meaningful way different from their initial proposal. A party cannot

⁵ HITV has now, nonetheless, presented a specific proposal to DIRECTV by e-mail dated November 17, a copy of which is attached as Exhibit 1 hereto. HITV has not received a response.

be allowed to get around the prohibition on making a “single, unilateral offer” by simply rephrasing that offer in other words. DIRECTV’s purported second proposal had two parts.⁶ The first was an offer to allow KFVE to assert mandatory carriage rights despite having elected retransmission consent. When DIRECTV’s initial offer had been to carry KFVE as if it had elected mandatory carriage, it is difficult, if not impossible, to see how this “alternative” offer had any meaning whatsoever. This is especially true in light of Media Bureau precedent indicating that parties cannot, by agreement, change the election made by a broadcast television station.⁷ Since all it did was rephrase the terms of DIRECTV’s original offer, this “alternative” cannot be seen as constituting a legitimate second proposal.

DIRECTV second “alternative” proposal is equally meaningless. That proposal would have simply extended the “must-carry-like” terms initially proposed by DIRECTV for an additional three years. Of course, this proposal is also meaningless, as HITV would, regardless of any extension or not, have been able to obtain exactly the same type of must-carry-like carriage for the period from 2021-2023 by simply electing must-carry in the 2020 election cycle. In other words, DIRECTV was merely offering to HITV something to which it was clearly entitled by law, and which DIRECTV would have been in no position to refuse. An “agreement” by DIRECTV to simply comply with the law and grant HITV its legal rights cannot be seen as adding anything to a “negotiation.” As with DIRECTV’s first “alternative” proposal, this offer cannot be read to have any meaning, or to constitute anything other than a rephrasing of DIRECTV’s initial, single, unilateral proposal.

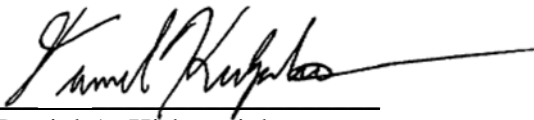
⁶ See Answer at Exhibit 3.

⁷ See, e.g., *Radio Perry, Inc. (WPGA-TV, Perry, Georgia) v. Cox Communications, Inc.*, 26 FCC Rcd 16392, 16395 (MB 2011) (“The Commission’s rules do not contemplate changing or disaffirming an election once made”), citing *Cablevision Systems Corp.*, 12 FCC Rcd 13121, 13127-28 (CSB 1996).

As demonstrated herein and in the Complaint, DIRECTV has refused, and continues to refuse, to negotiate in good faith for carriage of KFVE. It has repeatedly informed HITV that it would not consider terms any different from those it originally proposed, and has put forth “alternative” proposals that simply state the same proposal in different words or include nothing more than a promise from DIRECTV to recognize HITV’s undisputed legal rights. For the foregoing reasons, HITV respectfully requests that the Media Bureau determine that DIRECTV has failed to negotiate in good faith, as required by the Commission’s Rules, and grant such other and further relief as it deems just and proper.

Respectfully submitted,

HITV License Subsidiary, Inc.

By: 
Daniel A. Kirkpatrick

Its Counsel

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, Suite 1100
Arlington, VA 22209
(703) 812-0400

November 24, 2017

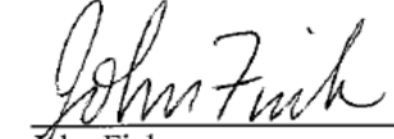
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To: Office of the Secretary
Attn: Chief, Media Bureau

DECLARATION OF JOHN FINK

1. My name is John Fink. I am General Manager of KFVE.
2. I have reviewed the foregoing Reply to Answer to Good Faith Negotiation Complaint and all factual matters set forth therein are true to the best of my knowledge and belief. To the best of my knowledge, information, and belief formed after reasonable inquiry, the foregoing Reply to Answer to Good Faith Negotiation Complaint is well grounded in fact; warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and is not interposed for any improper purpose.



John Fink
KFVE General Manager
HITV License Subsidiary, Inc.

Date: November 24, 2017

EXHIBIT 1

Dan Kirkpatrick

From: Dan Kirkpatrick
Sent: Friday, November 17, 2017 5:00 PM
To: 'DAI, HONGFENG'
Cc: ZARROW, JOSHUA D (Legal)
Subject: KFVE Counter-Offer

Julia:

On behalf of KFVE, I am sending to you, for DIRECTV's consideration, the counter-offer below for carriage of KFVE in the Honolulu DMA. Although in our last call, you again expressed DIRECTV's unwillingness to carry the station on any terms other than the "must-carry like" terms that you initially provided, my client has asked that I send you the following counter-proposal.

HITV would be willing to enter into an agreement reviving and extending the terms of the previous agreement governing carriage of the station for an additional three years (i.e. through August 31, 2020). The substantive terms of the prior agreement would remain unchanged, with the following minimal per subscriber rate increases, consistent with those in the prior agreement:

9/1/2017-8/31/2018: \$0.25
9/1/2018-8/31/2019: \$0.26
9/1/2019-8/31/2020: \$0.27

Thank you.

Dan

Daniel A. Kirkpatrick



Fletcher, Heald & Hildreth

1300 N. 17th Street, Suite 1100| Arlington, VA 22209

Tel: 703.812.0432| Fax: 703.812.0486 | Mobile: 703.967.1927

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CERTIFICATE OF SERVICE

I, Daniel Kirkpatrick, hereby certify that on this 24th day of November, 2017, I caused a copy of the foregoing "Reply" to be served via U.S. mail, postage prepaid, upon the following:

DIRECTV, LLC
2260 E. Imperial Hwy
El Segundo, CA 90245

A handwritten signature in black ink, appearing to read "Daniel Kirkpatrick", is written over a horizontal line.